

## Exhibit 17

DANIEL N. BALLARD, ESQ. (CSB #219223) (*Pro hac vice*)  
MICHAEL S. WILCOX, ESQ. (CSB #215269) (*Pro hac vice*)  
McDONOUGH HOLLAND & ALLEN PC  
Attorneys at Law  
555 Capitol Mall, 9th Floor  
Sacramento, CA 95814  
Phone: 916.444.3900  
Fax: 916.444.3249

ADAM B. PRICE, ESQ. (USB # 7769)  
JONES WALDO HOLBROOK & McDONOUGH  
Attorneys at Law  
170 So. Main Street, Suite 1500  
Salt Lake City, UT 84104-1644  
Phone: 801.521.3200  
Fax: 801.328.0537

Attorneys for Defendant and  
Counterclaimant Battens Plus, Inc.

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

DIVERSI-PLAST PRODUCTS, INC., a  
Minnesota Corporation,

Plaintiff,

v.

BATTENS PLUS, INC., a California  
Corporation,

Defendant.

AND RELATED COUNTERCLAIMS

Case No. 2:04CV01005 PGC

BATTENS PLUS, INC.'S FIRST  
SUPPLEMENTAL RESPONSES TO  
PLAINTIFF'S FIRST SET OF  
INTERROGATORIES (NOS. 1 TO 10)

PROPOUNDING PARTY: Plaintiff Diversi-Plast Products, Inc.

RESPONDING PARTY: Defendant Battens Plus, Inc.

SET NUMBER: One

890909v2 34873/0007

EXHIBIT

17

**PRELIMINARY STATEMENT**

Defendant Battens Plus, Incorporated ("Battens Plus") hereby supplements its responses, pursuant to Federal Rules of Civil Procedure 26(e) and 33, to the First Set of Interrogatories (Nos 1 to 10) propounded by Plaintiff Diversi-Plast, Inc. ("Diversi-Plast").

These Responses state the knowledge, information, and belief of Battens Plus as of the date served. Battens Plus is presently engaged in its own investigation and discovery. Further investigation may lead to additional information relevant to the subject matter of Diversi-Plast's requests. As a result, Battens Plus reserves its right to amend or supplement its Responses at any time and to use any subsequently acquired information at trial, hearing, and for any other purpose.

Moreover, Battens Plus notes that its Responses may be based upon hearsay or other forms of information that is not necessarily reliable nor admissible into evidence and, as a result, Battens Plus provides notice that it does not waive, and hereby specifically reserves, its right to object to the introduction into evidence of the Requests and/or its Responses thereto at any trial or hearing.

**GENERAL OBJECTIONS**

1. Battens Plus objects to each request to the extent it seeks information that is not relevant to the issues in this litigation or is not reasonably calculated to lead to the discovery of relevant information.

2. Battens Plus objects to the discovery requests to the extent they are unreasonably vague, overly broad, repetitious, unduly burdensome, or purport to required the disclosure of information beyond the scope of permissible discovery under the Federal Rules of Civil Procedure or this Court's Local Rules.

3. Battens Plus objects to the discovery requests to the extent they call for the production of information confidential to Battens Plus or third parties, including trade secrets, research and development, or commercial information entitled to be kept confidential under Federal Rule of Civil Procedure 26. Battens Plus will produce such information, to the extent it

is responsive, non-privileged and not covered by another objection, subject to the protective order.

4. To the extent any interrogatory requests information protected by the attorney-client privilege or work product immunity, or protected by any other applicable privilege or right, Battens Plus objects and will not provide such information.

5. Battens Plus objects to these interrogatories to the extent they violate this Court's Scheduling Order and the Federal Rule of Civil Procedure 33(a) limitation on the number of interrogatories including all discrete subparts.

6. Battens Plus objects to the discovery requests on the basis of the foregoing general objections and such other additional specific objections as have been set forth herein. Battens Plus does not waive any general objection to a specific discovery request unless a response to a specific request states that "all General Objections are waived."

#### INTERROGATORIES

##### INTERROGATORY NO. 5:

Separately, for each Accused Product sold since 1998, identify the total sales figures, including gross sales income, on a monthly basis, the amount of profit attributable to these sales, the number of unit sales, additional products sold with each such product, the quantity of each additional product sold, the price charged for each additional product, the gross net profit and margin for all products sold, and an explanation of how the profit is calculated.

##### RESPONSE TO INTERROGATORY NO. 5:

Battens Plus' objects to this Interrogatory as burdensome and oppressive. Moreover, the answer to this Interrogatory may be derived from the business records sought by Diversi-Plast's Request for Production of Documents Nos. 11 - 13. Without waiving these objections, Battens Plus will specifically identify the records responsive to those Requests and make them available for inspection and copying at a place, date, and time mutually convenient to the parties.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 5:**

Battens Plus incorporates herein all previous objections to this request.

Subject to and without waiving any previous objections, Battens Plus further responds that documents within the Bates range BP - 0041 to 44; BP - 0365 to 366; and BP - 0454 to 479 contain information responsive to this request.

**INTERROGATORY NO. 6:**

Identify and describe all facts and assertions underlying and supporting any contention that you do not infringe the '193 Patent, literally or under the doctrine of equivalents.

**RESPONSE TO INTERROGATORY NO. 6:**

Battens Plus' objects to this Interrogatory to the extent that it seeks production of information protected by the attorney-client privilege and attorney work product immunity. Without waiving said objection, Battens Plus' contends that its BattenUp batten does not infringe the '193 Patent either literally or under the doctrine of equivalents. The facts now known that underlie said contention are (1) the '193 Patent is invalid and, (2) if the '193 is not invalid, then the BattenUp batten does infringe because it does not contain a second "ply" as that term is used in the '193 patent.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 6:**

Battens Plus incorporates herein all previous objections to this request. Battens Plus also incorporates herein the Rebuttal Expert Report of Philip D. Dregger, dated February 13, 2006.

Subject to and without waiving any previous objections, Battens Plus further responds that it is unable to fully answer this request until after the Court has construed the terms in Claims 1 and 2 of the '193 Patent, as infringement can only be determined after the meaning of the claim terms are known. In addition, to the extent this request relates to any claim that may issue out of the Reexamination / Reissue proceeding pending in the U.S. Patent and Trademark Office, Battens Plus further objects that it cannot respond to this request until such claim(s), if any, issue and are construed by the Court.

Battens Plus further answers that the language of Claim 2 of the '193 Patent, the only claim alleged by Diversi-Plast to be infringed, is indefinite, as Diversi-Plast itself has admitted in a declaration supporting its Reissue Request. Because the language of Claim 2 is indefinite, there can be no infringement of that Claim. Moreover, Claim 1 of the '193 Patent, from which Claim 2 depends, includes "overlayment" and "tile" elements in addition to the "batten" element. Because Battens Plus does not manufacture or sell an "overlayment" or a "tile," Battens Plus does not directly infringe Claim 1 or 2 of the '193 Patent. Any assertion of contributory infringement or inducement of infringement is precluded by the fact that the BattenUp batten has substantial non-infringing uses, such as use with solar roofing panels, as shown in documents Bates labeled BP0929-0935.

**INTERROGATORY NO. 7:**

Identify and describe all facts, documents or other information that you contend constitutes prior art or which you contend renders any claims of the '193 Patent invalid, unenforceable or not infringed, including identification of any prior art that you contend the U.S. Patent and Trademark Office failed to consider that was more pertinent than the prior art of record, and a detailed explanation of how each such prior art reference is more relevant than the prior art of record.

**RESPONSE TO INTERROGATORY NO. 7:**

Battens Plus provided counsel for Diversi-Plast a complete Response to this Interrogatory on March 18, 2005, in the form of a Draft Request for Reexamination of the '193 Patent. The full text of that document is included herein by reference.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 7:**

Battens Plus incorporates herein all previous objections to this request.

Subject to and without waiving any previous objections, Battens Plus further answers that in addition to each and every reference identified in the Request for Reexamination Under 35 U.S.C. § 302, a draft of which was sent to counsel for Diversi-Plast on March 18, 2005, the

following references also constitute prior art that individually or in combination render various claims of the '193 patent invalid, unenforceable and/or not infringed:

U.S. Patent No. 5,947,817;

U.S. Patent No. 5,094,041;

U.S. Patent No. 3,647,606;

U.S. Patent No. 5,471,807;

German Patent DE 44 21 941 A1 (produced with translation at DP02159-2174);

Each and every reference listed on the cover page of U.S. Patent No. 6,357,193 B1 starting at line 56;

Products and literature produced by Cor-A-Vent, Inc. as described in the Expert Report of Philip D. Dregger and attached thereto as Exhibit D; and

The work performed by Lars J. Walberg in 1997 relating to the invention of the '193 patent and prototypes, photographs, documents and communications relating thereto.

Battens Plus further states that the failure to name Lars J. Walberg as a co-inventor and/or disclose his work to the U.S. Patent and Trademark Office during prosecution of the '193 Patent constitutes inequitable conduct that renders the '193 Patent unenforceable.

Battens Plus incorporates herein by reference the Opening Expert Report of Philip D. Dregger Concerning U.S. Patent 6,357,193 B1 served on January 17, 2006 and the exhibits thereto.

**INTERROGATORY NO. 9:**

Identify and describe all facts and assertions underlying and supporting your contention that the '193 Patent is unenforceable due to any acts of alleged inequitable conduct.

**RESPONSE TO INTERROGATORY NO. 9:**

The applicant of the '193 Patent willfully failed to disclose to the United States Patent and Trademark Office at least the following prior art that directly relates to the patentability of the '193 Patent: United States Patent Nos. 5,469,795; 5,509,987; 5,617,690; 5,794,396; UK Patent Application No. GB 2,062,056 A; and German Patent No. DE 44 21 941 A1.

**SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 9:**

Battens Plus incorporates herein all previous objections to this request.

Subject to and without waiving its General Objections and all previous objections, Battens Plus further answers that Richard J. Morris committed fraud and inequitable conduct on the Patent Office on or around January 4, 2000. At that time, Morris declared to the Patent Office that he was the original, first, and sole inventor of the inventions claimed in the '193 Patent when, in fact, he was aware that another person, most likely Lars J. Walberg, actually conceived of the claimed inventions and was involved in experiments testing the claimed inventions. Morris again committed fraud and inequitable conduct on the Patent Office on or around June 28, 2004 when he declared to Patent Office that he was the original, first, and sole inventor of the inventions claimed in the '193 Patent. Evidence demonstrating Morris' fraud and inequitable conduct, and specifically Walberg's inventorship and Diversi-Plast's and Morris's knowledge of that inventorship prior to January 4, 2000, is found in the depositions of Richard J. Morris, Lars J. Walberg, and the 30(b)(6) deposition of Gary Urbanski and the exhibits to those depositions, specifically, without limitation, Exhibit 34.

All declarations from Morris, Walberg, and Diversi-Plast that assert Morris and Walberg are co-inventors, and all declarations claiming that any mistake as to inventorship was without deceptive intent, are also false and constitute fraud and inequitable conduct. Even assuming Diversi-Plast and Morris did have a good faith belief that Walberg's activity in 1997 did not constitute inventive acts, their failure to disclose Walberg's activity during prosecution constitutes a failure to disclose potentially invalidating prior art and is, in itself, fraud and inequitable conduct.

DATED: February 16, 2006

McDONOUGH HOLLAND & ALLEN PC  
Attorneys at Law

By: 

MICHAEL S. WILCOX

Attorneys for Defendant and Counterclaimant  
Battens Plus, Inc.



**CERTIFICATE OF SERVICE**

I am employed in the County of Sacramento; my business address is 555 Capitol Mall, 9th Floor, Sacramento, California. I am over the age of eighteen years and not a party to the foregoing action.

On February 16, 2006 I served the within:

**DEFENDANT BATTENS PLUS, INC.'S FIRST SUPPLEMENTAL RESPONSES TO  
PLAINTIFF'S FIRST SET OF INTERROGATORIES (NOS. 1 TO 10)**

- ☒ (by mail) on the party(ies) listed below by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At McDonough Holland & Allen PC, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.
- ☒ by facsimile transmission, in accordance with Code of Civil Procedure § 1013(e), to the following party(ies) at the facsimile number(s) indicated.

Matthew G. Bagley  
KESLER & RUST  
36 South State Street, Suite 2000  
Salt Lake City, Utah 84111  
Telephone: (801) 532-8000  
Facsimile: (801) 531-7965

*Attorneys for Plaintiff Diversi-Plast Products,  
Inc.*

Randall T. Skaar  
Matthew T. Macari  
Tye Biasco  
PATTERSON, THUENTE,  
SKAAR & CHRISTENSEN, P.A.  
4800 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402-2100  
Telephone: (612) 349-3740  
Facsimile: (612) 349-9266

*Attorneys for Plaintiff Diversi-Plast Products,  
Inc.*

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 16, 2006, at Sacramento, California.



BONNIE CURRIE